No. 88-266

In The

Supreme Court of the United States

OCTOBER TERM, 1988

OKLAHOMA TAX COMMISSION, *PETITIONER*,

v.

JAN GRAHAM, *et al.*, *RESPONDENT*.

REPLY BRIEF FOR THE OKLAHOMA TAX COMMISSION

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I. THE TAX COMMISSION'S PETITION IN STATE DISTRICT COURT IS NOT REMOVABLE TO THE FEDERAL COURT.

The Chickasaw Nation's brief on the issue of removal jurisdiction misses the point of concern. The Tribe discusses several issues involving federal law which may emerge in this suit regarding Indian Sovereignty and federal rights belonging to this Tribe. The State admits that this lawsuit will involve the determination of federal questions. But these federal questions are not the basis of the State's cause of action to enforce its tax laws.

When the Federal Court considers the porpriety of removing a case from the State Court system, the consideration is limited to a

scrutiny of the basis of the plaintiff's claim contained in the original pleading. No consideration is given to the defendant's answer or responsive motions which may assert issues of federal law in a defensive argument. Even the complaint itself will not serve as a basis for jurisdiction if it goes beyond a plain statement of the plaintiff's cause of action and replies to a probable defense.

Although the Tribe has discussed many isses of federal law that would serve to sustain federal jurisidiction had they brought suit against the State, that is not the case which presents itself here because the Tribe did not bring this action. This lawsuit was brought by the State asserting claims arising from state laws alone. The State's claims may involve questions of federal law. However, not every question of federal law emergining in a suit is proof that a federal law is the basis of the suit.

In *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936) at 116, this Court illustrated how the federal question must be the basis of the plaintiff's claim rather than an issue that may be involved in the defense of the claim by the following example:

> The argument for the respondent proceeds on the assumption that, because permission at times is preliminary to action, the two are to be classed as one. but the assumption will not stand. A suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail. Let us suppose an amendment of the Constitution by which the States are left at liberty to levy taxes on the income derived from federal securities, or to lay imposts and duties at their pleasure upon imports and exports. If such an amendment were adopted, a suit to recover taxes or duties imposed by the state law would not be one arising under the Constitution of the United States, though in the absence of the amendment the duty or the tax would fail. We recur to the test announced in Puerto Rico v. Russell & Co., supra: "The federal nature of the right to be established is decisive - not the source of the authority to establish it." Here the right to be established is one created by the state.

In the case at bar, the tax here in controversy is imposed under the authority of a statute of Oklahoma. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. Therefore, the only forum available to the State in actions to enforce state tax laws are the State District Courts.

The remainder of the Tribe's argument on removal jurisdiction proposes that the well-plead complaint rule is inapplicable to this case because this cause of action is completely pre-empted by federal law. This argument is unpersuasive because the Oklahoma Tax Commission has been operating for years under the knowledge that the Federal Government has not pre-empted Oklahoma's revenue laws and to be informed of the contrary would be quite a revelation. Be that as it may, the Tribe asserts federal jurisidiction by way of a federal question, rather then diversity of citizenship. In *Caterpillar, Inc. v. Williams*, 107 S.Ct. 2425 (1987), this Court flatly stated that "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists *only* when a federal question is presented on the face of the plaintiff's properly pleaded complaint."

There does exist an independent corollary to the well-pleaded complaint rule known as the "complete pre-emption" doctrine, wherein the Court concludes that the pre-emptive force of a statute is so extraordinary that it completely occupies the field to the exclusion of state law to the end that a state law claim within the field would present a federal question. The Tribe contends that a suit against an Indian tribe is such a claim because the field of "Indian law" is completely pre-empted by federal law. The answer to this contention is found in this Court's opinion in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) at 147 which holds:

> At the outset, we reject - as did the state court - the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise whether the enterprise is located on or off tribal land.

The fields of Indian law and state taxation are not completely pre-empted by federal law and therefore the State's claim does not present a federal question. The Tribe's federal pre-emption or immunity defense must be heard in State Court. The Tribe asserts that this conclusion would foreclose its access to the federal forum. But this concern is infounded because the Tribe may bring any federal claims they have in an action in federal court. however, the Tribe did not bring this action; the State did, and the State has no federal claims.

II. TRIBAL SOVEREIGN IMMUNITY IS NOT A DEFENSE TO THE STATE'S CLAIM

The Tribe ties its sovereign immunity theory to the proposition in its brief that "the Chickasaw Reservation in Oklahoma has not been disestablished by Congress." The Tribe raises this argument in order to claim the immunities which may arise from that status. Of course, the State argues the reverse because tribal activities not on any reservation are subject to state law applicable to all citizens of the State, *Mescalero*, supra. This issue is necessarily at the core of the Tribe's immunity defense because a Tribe in its capacity as a Tribe has no inherent immunity in relation to the State. A tribe is immune from state jurisdiction only by virtue of activity within a federal land area or reservation, set aside by the Federal Government for the use of the tribe, because of the Federal Government's maintenance of jurisdiction upon federal land. This Court has therefore held in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) that "the question has always been whether the state's action infringed on the right of *reservation Indians* to make their own laws and be ruled by them" (the Court's emphasis at 411 U.S. 181). The Tribe has no immunity standing alone, vis-a-vis the State, rather, this issue involves the allocation of power between the State and the Federal Government.

If the land in question is a federal Indian reservation, then, under the aegis of the central government's jurisdiction, the federal policy provides that the Indian Tribes should be free to exercise their

rights to govern themselves, more or less independent of state laws. But the fact that this land is not part of a federal reservation removes the cloak of immunity associated with that status from the tribal activity. The State's brief contains a litany of substantial and compelling evidence of congressional intent to dispose of the Chickasaw Reservation in Oklahoma, not the least of which were the reports submitted to Congress by the Dawes Commission which leave no doubt as to what Congress meant to accomplish. The Tribe argues that no matter what the congressional reports say, there is no statute which explicity states that the Chickasaw reservation is hereby disestablished and State jurisdiction shall henceforth obtain. Although such clear cut legislation would go a long way toward eliminating litigation, this Court has realized that when Congress began its program of opening up the Indian reservations for settlement at the turn of the century, Congress did not concern itself with such meticulous language because at the time the prevailing wisdom was that the reservation system would cease to exist and therefore such careful drafting seemed unnecessary.

For this reason, this Court has ruled in *Solem v. Bartlett*, 465 U.S. 463 (1984), that explicit language of cession and compensation are not prerequisites for a finding of diminishment. When events surrounding the passage of a surplus land act - particularly the manner in which the transaction was negotiated with the Tribes involved and the tenor of legislative reports presented to Congress - unequivocally reveal a widely-held, contemporaneous understanding that the reservation would be disestablished, the Supreme Court will infer that to be Congress' intent notwithstanding unclear statutory language. Also, the Court will consider factors such as events occurring after the passage of a surplus land act, the manner in which the Bureau of Indian Affairs dealt with the opened land, and Congress' own treatment of the affected area, as well as recognizing who actually moved onto opened reservations as relevant to deciding whether the area has lost its Indian character through diminishment. In this case, the authorities cited in the State's brief specifically relate Congress' intent to dispose of this reservation. Also, the Bureau of Indian Affairs describes it as the

"former Chickasaw reservation" indicating its discontinued existence, see *Indian Lands and Related Facilities as of 1971*, map, Bureau of Indian Affairs, U.S. Geological Survey, U.S. Dept. of Interior.

The Tribe asserts that the intentions of Congress to dispose of the Chickasaw reservation under the Curtis Act (30 Stat. 495) were set aside by the passage of the Oklahoma Indian Welfare Act, 25 U.S.C. § 501 et seq.. But the State's brief cited Senate Report 1232, 74th Congress, 1st Sess., July 29, 1935, which accompanied the OIWA and clearly demonsrates that Congress recognized that no reservations survived past statehood. The Tribe attempts to impeach the State's citation to the authority of Report 1232 by contending that this report accompanied an earlier version of the OIWA which was not enacted. That statement is incorrect. The Tribe cited H. Rep. No. 2408, 74th Cong. 2nd sess. (1936) as the report which accompanied the OIWA, which is correct because on the face of the report is clearly printed the words "To accompany S. 2047". That notation was also made on the face of report 1232 which means that both reports accomapnied this bill in Congress. Bill S. 2047 was enacted as the Oklahoma Indian Welfare Act. Both of these reports did in fact accompany the OIWA in Congress and both reports express the intent of Congress with regard to that legislation (Report 2408 references Report 1232 at page 4).

Report 2408 does add to the understanding of legislative intent within the OIWA and is an important citation. It should be noted first of all that, contrary to what might be implied in the Tribe's brief, there is nothing in Report 2408 that contradicts the language in Report 1232 and the reports are to be read together as the legisaltive history of the OIWA. In any event, the language in Report 2408 that was emphasized by the Tribe in its brief is of great significance. The report states:

> . . . These sections will permit the Indians of Oklahoma to excercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the Indian Reorganization Act of June 18, 1934.

This statement illustrates what the State has been trying to explain all along. The State of Oklahoma has been given separate and special treatment which is different than that given any of the other forty-nine states. The fact that Oklahoma Indians were dealt with in a separate act demonstrates that the Indian situation is unique in Oklahoma and unlike any other state. But Congress has not created an immunity here by affirmative action and the immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication, *Oklahoma Tax Commission v. Texas Co., 336 U.S. 342 (1949) at 365*. In *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), this Court recognized in note 5 at page 603 that some progess has been made in the restoration of tribal government under the OIWA, however, the Court still found that the underlying principles on which the reservation cases are based do not fit the situation of the Oklahoma Indians because of the lack of tribal autonomy of the Oklahoma tribes.

More recently, this Court cited these two cases dealing with Oklahoma for authority in the opinion in *Mescalero Apache Tribe v. Jones* which rules that the Indian Reorganzation Act provides no immunity from state law. The Court ruled at 411 U.S. 157:

> Here, the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by §§476 and 477 of the Act. These provisions were designed to encourage tribal enterprises "to enter the white world on a footing of equal competition." 78 Cong. Rec. 11732. In this context we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to. We therefore hold that the exemption in §465 does not encompass or bar the collection of New Mexico's nondiscriminatory Gross Receipts Tax and that the Tribe's ski resort is subject to the tax.

Since Report 2408 expresses Congress' intent that the OIWA should permit Indians of Oklahoma to exercise the same

rights as those granted to Indians outside of Oklahoma by the IRA, this Court should conclude that tribal enterprises in Oklahoma who use these provisions to enter the business community on a footing of equal competition should also abide by the law and pay their taxes. The *Mescalero* decision illustrates that these rights carry with them the burden of taxation that is equally carried by all the competitors in the economic marketplace. Contrary to the Tribe's position that the IRA or the OIWA bestows upon Indian tribes freedom from state laws, this Court ruled at 411 U.S. 152 that:

> The Reorganization Act did not strip Indian tribes and their reservation lands of their historic immunity from state and local control. But in the context of the Reorganization Act, we think it unrealistic to conclude that Congress conceived of off-reservation tribal enterprises "virtually as an arm of the Government." (Citations omitted). On the contrary, the aim was to disentagle the tribes from the official bureaucracy. The Court's decision in *Organized Village of Kake [v. Egan, 369 U.S. 60 (1962)]*, which involved tribes organized under the Reorganization Act, demonstrates that off-reservation activities are within the reach of state law.

The Tribe attempts to distinguish this case from *Mescalero* by contending that their business is not operated off of a reservation since the business is located within the boundaries of the Tribe's "original reservation." The State would submit that this distinction is merely a play on words by the Tribe. If the Tribe actually inhabited a reservation, it would be appropriate to refer to it as the "Chickasaw Reservation" without a need to qualify it as the "original" reservation. The Bureau of Indian Affairs more accurately describes the status of the land in question as the "former reservation" which is really a non-status that characteristics this area of Oklahoma as not any kind of reservation or as a non-reservation area. This status is identical to the land status found in the Mescalero case and therefore, *Mescalero* is controlling.

The Tribe cites various cases involving reservations in support of its theory that the trust status of their land meets the test of

"Indian country status" as its land is tribually owned land devoted to Indian occupancy and validly set apart for the use of Indians, page 36 of respondent's brief. however, the cases cited by respondent, to-wit: *United States v. Pelican*, 232 U.S. 442, *United States v. McGowan*, 302 U.S. 535, and *United States v. John*, 437 U.S. 634, each involved land purchased by the United States for a tribal community or land within a recognized Indian reservation and proclaimed as such upon which was located a resident tribal population. The case at bar is distiguishable from that situation because the Chickasaw Nation purchased this motel on their own account for use as a business property, not as a place for tribal members to live. The United States government did not purchase this property for the Tribe or set it aside for the Tribe's use but only accepted the property in trust on behalf of the Tribe. As this Court has ruled in *Mescalero*, the transfer in trust does not cloak the enterprise with immunity. Due to this distinction, the State would disagree with the Tribe that *Mescalero* was overruled by *John*.

As for the Tribe's objections to the constitutional arguments raised in the State's opening brief, the State must first point out that it was never the State's position that Section 1151 should be invalidated as violative of the Constitution. As applied to federal reservations, Section 1151 operates validly within the powers of the federal government. However, the State insists that the lower courts incorrectly applied the statute to pre-empt state law from applying to the Tribe's off-reservation business. The lower court's application of the statute in its order, rather than the statute itself, is an unconsitutional infringement upon the State's rights. The State does not ask for a declaration from this Court that Section 1151 is unconstitutional, the State asks that the lower decision be reversed.

Finally, the Tribe argues that its theory of absolute sovereign immunity has been upheld by this Court in several opinions cited in the Tribes brief. The Tribe's authority is distinguishable from the situation which is presented in this case. For example, the Tribe cites the case of *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940) for this

proposition. In *U.S. Fidelity*, the case involved the litigation of contracts entered by the United States in its own name on behalf of the Indian Tribes. Since the Federal Governments interest was being litigated and the United States was suing in its own name to protect that interest, the immunity of the United States attached to the Tribal beneficiary because this Court would not allow the private party defendant to circumvent the immunity of the Federal Government by counterclaiming the tribe in order to defeat the governments interest.

In the case at bar, the United States is not a party and no federal rights are involved or are being infringed. Also, the Federal Government takes no responsibility for the actions of the Tribe or the operation of the tribal business. Other than holding the legal title to the land in trust for the Tribe, the United States has no interest in the tribal business and has no duty to manage the affairs of the enterprise, which is strictly a tribal concern. Since the legal title to the land is not challenged the interests of the United States are not implicated in this lawsuit. Furthermore, the State is not a private litigant but a sovereign entity in its own right as it is an integral part of the federal system. Although the Tribe is subordinate to only the Federal Government, not the States, likewise, the States are subordinate to only the Federal Government and not the Tribe. Therefore, the Tribe standing ALONE cannot assert sovereign immunity over the State's lawsuit, especially in view of the fact that the sovereignty of the Tribe is of limited and dependent character. The Tribe's citations to cases involving private litigants and reservation tribes in other States presents circumstances so far removed from this action involving the State's rights to collect validly imposed taxes, that those cases provide no authority upon which its claimed immunity can rest.

Also, the Tribes citation to *Chemehuevi Indian Tribe v. California*, 757 F.2d 1047 (9th Cir. 1985) is unavailing because that decision was reversed by this Court in a *per curiam* decision at 474 U.S. 9. On remand to the Ninth Circuit, that Court held in *Chemehuevi Indian Tribe v. California*, 800 F. 2d 1446 (9th Cir. 1986) at 1448 that the doctrines of federal pre-emption and tribal self-

government are "independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." If the state action is not pre-empted by federal legislation or treaty, the state need only satisfy the test laid down in *Williams v. Lee*, 358 U.S. 217 (1959) that state action must not infringe on the rights of reservation Indians to govern themselves. This principle of tribal self-government seeks an accomodation between the interests of the Tribe and the Federal Government, on the one hand, and those of the State, on the other, *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). The State disagrees that the Tribe's sovereign immunity theory is upheld in the context of the *Chemehuevi* decisions, especially in light of the fact that there is no reservation involved in this case.

The right to do business in the State of Oklahoma carries with it the burden of collecting the State's taxes, and the business is responsible for making the State whole if it breaches that duty. Equality of privilege and equality of obligation should be inseparable associates, *Oklahoma Tax Commission v. United States*, supra. The vendor liability provisions of the State's sales and cigarette tax laws only operate against the Tribe if its fails to properly collect, report and remit the taxes in violation of State law and the Federal case law on point. The Tribe's contention that it cannot be held liable for such violation due to its status as a Tribe would render this Court's decision in *Mescalero* and *Colville* nugatory.

Under those decisions it is settled law that the Tribe is required to collect the States taxes. But if the State is prevented from assessing the Tribe for delinquent taxes, or from suing the Tribe to enjoin the operation of its business in Oklahoma until the taxes are paid, then there is no effective enforcement mechansim available to the State to collect its taxes. This lawsuit is evidence itself that the Tribe will not collect the taxes as prescribed in the *Mescalero* and *Colville* decisions on its own volition. In order that the decisoions of this Court be effective as law rather than policy, this Court should require the Tribe to answer the State's complaint.

CONCLUSION

This Tribe has entered the economic marketplace of the State in direct competition with other businesses. The cost of doing business includes the liability for taxes or damage that the business causes because business has always been required to pay its own way. The Tribe may avoid this burden by not operating a business, but if the tribal activity reaches out to the general community and invites the public into its business place, it must be responsible to the community for the liability that it accrues.

For these reasons the Oklahoma Tax Commission respectfully requests that this Court reverse the decision of the Tenth Circuit Court of Appeals and hold that the States action was improperly removed to federal court and the Tribes sovereign immunity theory is not a defense to the States action.

Respectfully submitted,

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